Supreme Court, U.S.
FILED
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(7)

No. 06-1006

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Mary Hendow and Julie Albertson respectfully submit this supplemental brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

I. CERTIORARI SHOULD BE DENIED IN THIS INTERLOCUTORY APPEAL BECAUSE PETITIONER JUST FILED A POTENTIALLY DISPOSITIVE MOTION TO DISMISS IN THE UNDERLYING DISTRICT COURT ACTION

On March 22, 2007, after Respondents forwarded their Brief in Opposition to the printer for filing with this Court, Petitioner University of Phoenix filed and served a Fed. R. Civ. P. 12(b)(1) motion to *dismiss all claims* in the underlying action in the Eastern District of California, Case No. CV-03-0457 GEB DAD. Resp. Supp. App. 2a, 4a.

Respondents intend to oppose the motion to dismiss with Ninth Circuit and other appellate authority to the contrary of Petitioner's motion to dismiss. Should the district court grant the motion, however, such decision would dispose of the entire case and render moot Petitioner's request for certiorari.

II. PETITIONER REPRESENTS TO THIS COURT DAMAGES ASSESSMENTS THAT ARE DRAMATICALLY DIFFERENT FROM THOSE PRESENTED IN PETITIONER'S MOTION TO DISMISS IN THE DISTRICT COURT, RENDERING MOOT ONE OF PETITIONER'S STATED GROUNDS FOR GRANTING CERTIORARI

Petitioner represents to this Court that certiorari should be granted on the ground Petitioner is at risk of paying "more than a billion dollars in damages" and Petitioner "will face enormous

pressure to settle the case in order to avoid the uncertainties of going to trial." Reply 9.

Simultaneously, in its motion to dismiss, Petitioner represents to the district court "[w]hile this case was on appeal from the Court's order dismissing Relators' Second Amended Complaint, the Government administratively pursued and settled the allegations asserted in this *qui tam* action against UOP for $9.8 million." Resp. Supp. App. 5a.

Given that the district court ruling on the subject motion may dispose of Petitioner's contradictory contentions about its damages exposure by dismissing the case, such is all the more reason not to grant interlocutory appeal.

CONCLUSION

For the foregoing additional reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Counsel for Respondents

April 9, 2007

SUPPLEMENTAL APPENDIX

Appendix A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* MARY HENDOW and JULIE ALBERTSON, Plaintiffs,

vs.

UNIVERSITY OF PHOENIX and DOES 1-500, Inclusive, Defendants.

Case No. CIV. S-03-0457 GEB DAD

MINUTE ORDER: The pretrial scheduling conference, currently set for 4/23/07 is rescheduled for 8/13/07 at 9:00. A joint status report is to be filed fourteen days prior to the hearing. The motion to dismiss, currently scheduled for 4/30/07, is reset for 6/11/07 at 9:00 a.m. Ordered by Judge Garland E. Burrell Jr. on 4/2/07. (Furstenau, S)

Appendix B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* MARY HENDOW and JULIE ALBERTSON, Plaintiffs,

vs.

UNIVERSITY OF PHOENIX and DOES 1-500, Inclusive, Defendants.

Case No. CIV. S-03-0457 GEB DAD

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS RELATORS' SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

[Notice of Motion and Motion, Request For Judicial Notice, Declaration of Robert T. Collins, and Appendix of Unpublished Authorities filed concurrently herewith]

Judge: The Honorable Garland E. Burrell

Place: Courtroom 10

Date: April 30, 2007

Time: 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Phoenix ("UOP") brings this Motion because it is no longer a proper defendant in this False Claims Act ("FCA") case. While this case was on appeal from the Court's order dismissing Relators' Second Amended Complaint, the Government administratively pursued and settled the allegations asserted in this *qui tam* action against UOP for $9.8 million. The Government therefore pursued an "alternate remedy" to this action within the meaning of the FCA, 31 U.S.C. § 3730(c)(5). Consequently, the Government's claims against UOP are now barred as moot, and Relators no longer have standing to assert claims against UOP on the Government's behalf. All that remains is for a court to determine how much, if any, Relators are entitled to of the $9.8 million that UOP has already paid to the Government as a result of Relators' allegations.

[. . . .]

Appendix C

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 30, 2007, at 9:00 a.m., or as soon thereafter as the matter may be heard at the United States District Court, located at 501 I Street, Sacramento, California 95814, in Courtroom 10, the Honorable Garland E. Burrell, Jr. presiding, defendant the University of Phoenix ("UOP") will move, and hereby does move the Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss all claims asserted by relators Mary Hendow and Julie Albertson ("Relators") against UOP on the grounds that this case is moot and Relators no longer have standing under Article III of the United States Constitution.